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Sex, Theory, & Practice: Reconciling Davis v. Monroe & the Harms Casued by Children

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SEX, THEORY, & PRACTICE: RECONCILING *DAVIS V. MONROE* & THE HARMS CAUSED BY CHILDREN

*Michele Goodwin**

> Education is perhaps the most important function of the state and local governments.[1]

INTRODUCTION

Davis v. Monroe County Board of Education[2] is considered by many to be a groundbreaking sexual harassment case of monumental significance.[3] At the end of the twentieth century, it stood as the first case granted review by the United States Supreme Court that involved a peer sexual harassment claim brought under Title IX of the U.S. Code. In a five to four decision with Justice Sandra Day O'Connor writing for the majority, the Supreme Court held that a private Title IX damages action could lie against a board of education and its employees in a case involving peer sexual harassment.[4] The Court reasoned that when the Monroe County School Board was deliberately indifferent to the misconduct of a student and possessed ac-

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1. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

2. Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (holding that private damages actions may lie against a school board in cases of peer sexual harassment under Title IX where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities).

3. *See, e.g.*, Suzanna Sherry, *Some Targets Were Larger Than Others*, WASH. POST, July 4, 1999, at B4; Cynthia Gorney, *Teaching Johnny the Appropriate Way to Flirt*, N.Y. TIMES, June 13, 1999, at 43; Ruth D. Raisfeld, *Analysis of Supreme Court Rulings on Student Sexual Harassment Cases*, N.Y.L.J., July 7, 1999, at 1; Mary Leonard, *Schools Can Be Liable If Pupils Harass: Supreme Court Rules on Suits*, BOSTON GLOBE, May 25, 1999, at A1; Paul Ruffins, *A Guiding Insight*, BLACK ISSUES IN HIGHER EDUCATION, Feb. 18, 1999, at 24; Jennifer J. Hamilton, *School Board May Be Liable For Student-On-Student Sexual Harassment*, CONNECTICUT EMPLOYMENT LAW LETTER, July, 1999 (Vol. 7, Issue 7).

4. *See Davis*, 526 U.S. at 641.

tual knowledge of his severe misconduct, a private action brought by the victim's mother on her daughter's behalf could survive judicial scrutiny.[5]

In its first attempt to define the parameters and scope of this ruling, the Supreme Court reasoned that the harassment must be sufficiently concrete, thereby depriving the victim access to the educational benefits offered by the school.[6] The Supreme Court further held, as demonstrated in *Davis*, the misconduct must be pervasive, severe, and objectively offensive.[7] Although the *Davis* case does not establish a strict test for peer sexual harassment, it nevertheless appears to have set a standard by which lower courts must abide. In fact, commentators have credited the opinion for providing guidance to school districts.

Davis ushers in a new era for the Court because it is the first Supreme Court decision that provides for damages against an educational institution for failing to address *peer* sexual harassment since Congress passed the Title IX Educational Amendments of 1972.[8] Peer harassment is often minimized or overlooked entirely;[9] however, cases involving teacher-student sexual harassment are perceived as clearly objectionable.[10] In fact, many legal scholars would agree that a teacher who creates a hostile environment through his or her sexual harassment of students compromises an educational opportunity for those students.[11] However, courts, as well as individual commentators, have been split on the issue as to students.[12]

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5. *Id.* at 652 (noting that "damages are not available for simple acts of teasing and name-calling among school children").

6. *Id.* at 654.

7. *Id.* at 653. *See also*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

8. 20 U.S.C. §1681 (a) (2001). Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

9. *See infra* notes 70-79 and accompanying text.

10. *See* Baynard v. Malone, 268 F.3d 228 (2001) (holding school district showed deliberate indifference to teacher's sexual harassment of student and causing constitutional injury); P.H. v. School Dist. of Kansas City, 265 F.3d 653 (2001); *See also*, Greg Barret, *Schools Redraw The Sexual Lines: Teacher-Student Sex Has More Attention, But Few Solutions*, USA TODAY, Sept. 6, 2001, at D10; Terri L. Regotti, *Negligent Hiring and Retaining of Sexually Abusive Teachers*, 73 EDUC. L. REP. 333 (1992); Eric J. Kuperman, *The Mark of Cain: No Second Chance for Teachers Convicted of Sex Offenses Against Students*, 3 CARDOZO WOMEN'S L.J. 491 (1996).

11. *See* Kuperman, *supra* note 10, at 512.

12. *See* Vance v. Spencer County Public School Dist., 231 F.3d 253 (2000) (holding that school district had subjected student to intentional sexual discrimination inviolation of Title IX as a result of peer harassment); Murrell v. School Dist. No. 1, 186 F.3d. 1238 (1999) (plaintiff mother successfully showed that school district officials were knowledgeable and indifferent to the sexual harassment experienced by her daughter). *But see*, Manfredi v. Mount Vernon Bd. of Ed., 94

Prior to *Davis*, the Court had only defined the contours of a right to be free from teacher-student sex discrimination at both secondary and higher education institutions.[13] In *Cannon v. University of Chicago*, the Court established that Congress intended for Title IX to allow for private causes of action relating to sex discrimination at federally funded institutions.[14] More recently, in both *Franklin v. Gwinnett County Public School* and *Gebser v. Lago Vista Independent School District*, which involved sexual harassment claims brought against high school teachers, the Court further outlined the standard for reviewing Title IX sexual harassment causes of action. These cases failed to provide guidance for, or perhaps did not contemplate, peer sexual harassment claims under Title IX.

Davis broadens the scope of Title IX's applicability to cases involving sex discrimination in educational institutions that receive federal funding. Here, the Court opined that a recipient of federal funds intentionally violates the spirit and intent of Title IX by denying a student the benefits of education or subjecting a student to discrimination in any educational program. Commentators have suggested that *Davis* is one of the most important education cases in the twentieth century.[15] The case marks a turning point in the American

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F. Supp. 2d 447 (2000); C.R.K. v. U.S.D. 260, 76 F. Supp. 2d. 1145 (2001); KF's Father v. Marriott, 2001 U.S. Dist. LEXIS 2534 (S.D. Ala. Feb. 23, 2001).

13. *See* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (establishing precedent by interpreting Title IX to allow for private right causes of action in sex discrimination cases); Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992) (establishing a remedy under Title IX for teacher-student sexual harassment where a teacher subjected a high school student to continuous sexual harassment through overtures in class and intercourse in his office); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (further defining the protection offered by Title IX for teacher-student sexual harassment, establishing the deliberate indifference and actual notice requirements).

14. *See e.g.*, *Cannon*, 441 U.S. at 694-95 (comparing Title IX with Title VI, which allows for a private cause of action in race discrimination cases).

15. *See* Ruffins, *supra* note 3, at 24 (noting the importance of studying the case for its significant racial and ethical implications); *see also*, Verna L. Williams, *A New Harassment Ruling: Implications for Colleges*, THE CHRON. OF HIGHER EDUC., June 18, 1999, at A56 (suggesting that colleges and universities can learn "plenty" from "a legal case about two fifth-graders in an elementary school," urging that the decision was a "wake-up call to the nation's educational institutions"); Margo L. Ely, *Students Win Narrow Protection in Narrow Victory*, CHI. DAILY L. BULL., June 14, 1999, at 5 (noting that it had "been more than 30 years since Congress enacted Title VII of the Civil Rights Act, which prohibits sex discrimination in employment," and that it took nearly 25 years for the United States Supreme Court to hold "that the protection in educational programs includes the right to be free from sex harassment by other students").

While many consider the case to be significant for the precedent it sets, not all commentators are pleased with the ultimate holding in *Davis*. Among those who have criticized the judicial reasoning are advocates for young women, girls, gays, lesbians, and bisexuals who claim that the standard established in *Davis* is too high. For a discussion of this particular perspective, see Lynne Bernabei, *A Standard Set Too High; Instead of Triggering Suits, Georgia Title IX Ruling Raises Threshold*, FULTON COUNTY DAILY REP., July 20, 1999.

social conscious and creates precedent in civil rights, education, and feminist jurisprudence.[16]

Although peer sexual harassment has been pervasive, intense, and well documented in at least two often-cited studies,[17] school administrators traditionally have overlooked or dismissed such misconduct as insensitive and immature but harmless behavior.[18] Jacqueline Woods, the Executive Director of the American Association of University Women, remarks that "sexual harassment is part of everyday life for boys and girls at school."[19] Comments such as "boys will be boys" often punctuate the victim's interaction with the seemingly disinterested school administration.[20] Even Justice Antonin Scalia pointed out during oral arguments for the *Davis* case that "little girls always tease little boys and little boys always tease little girls," noting that such behavior is not uncommon and perhaps echoing the sentiment of school administrators.[21]

This Article argues that a broader understanding of sexual conduct among youth in America's public schools is needed to create more effective legal, ethical, and public policy responses. It suggests that sexual harassment in the public school setting must be viewed with a

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Others have staunchly criticized the narrow majority ruling in the case, comparing the Court's holding to inappropriate and misguided judicial activism and suggesting that children's behaviors cannot be compared with that of adults, as children lack the knowledge and maturity to distinguish right from wrong. *See* Mark Hamblett, *Judge Blasts School Harassment Case*, THE NAT'L L. J., May 1, 2000, at A9 (quoting Judge McMahon as saying, "*Davis* is classic example of the old law school maxim that "bad facts make bad law").

16. *See* Williams, *supra* note 15, at A56.

17. *See e.g.*, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (Am. Ass'n of Univ. Women Educ. Found. ed., 2001) [hereinafter AAUW SURVEY II] and its predecessor; HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (Am. Ass'n of Univ. Women Educ. Found. ed., 2001) [hereinafter AAUW SURVEY I].

18. *Id. See also*, Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) (petitioners claiming that they were regularly sexually harassed by peers and informed school officials who failed to respond); Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560 (N.D. Cal. 1993), *rev'd*, 54 F.3d 1447 (9th Cir. 1995), *reh'g granted*, 949 F. Supp. 1415 (N.D. Cal. 1996) (student arguing that school counselor failed to appropriately respond to her pleas to intervene and stop the alleged peer harassment).

19. *See* comments of Jacqueline Woods regarding the pervasiveness of sexual harassment in America's public schools and the 2001 AAUW Survey II at http://www.aauw.org/2000/hostile.html (last visited Apr. 5, 2002).

20. *See* Jehan A. Abdel-Gawad, *Kiddie Sex Harassment: How Title IX Could Level The Playing Field Without Leveling The Playground*, 39 ARIZ. L. REV. 727, 731 (1997) (citing Todd Woody, *School Counselor Entitled to Immunity, Court Says*, RECORDER, May 15, 1995, at 3; Jim Herron Zamora, *Ex-Student Can't Sue Counselor over Harassment*, S.F. EXAMINER, May 13, 1995, at A3).

21. Supreme Court Transcript at 3, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999) (No. 97-843) .

clear understanding about how America's public schools operate. This requires reading *Davis* in context with practical considerations, while acknowledging and addressing the traumatic, often life-long effects of bullying, sexual harassment, and sexual abuse. While ultimately correctly decided, *Davis* is a potentially problematic holding in that what it seems to grant is ultimately more illusory than real. The case itself may not necessarily cure inappropriate sexual conduct in America's public schools, but rather may result in increased criminal complaints filed against elementary and middle school students by school administrators concerned about possible litigation.

The scope of this paper is intentionally narrow and, thus, may raise more questions for further consideration by the author or colleagues interested in the topic. It addresses four issues. First, Part II addresses the facts in *Davis*, giving voice to LaShonda's experience. Part III uses the judicial precedent set in *Davis v. Monroe County Board of Education* and its progeny to discuss the merits and drawbacks of judicial intervention in sexual harassment incidents among youth. Part IV analyzes the psychological impact of sexual harassment on youth and the long and short-term psychological effects of sexual violence. Finally, Part V suggests alternative intervention models to address sexual harassment in the public school setting.

II. JUDICIAL REMEDY AND THE POWER OF STICKS, STONES, AND WORDS . . .

> Ideas are powerful shapers of behavior. No idea has had graver consequences than this: one group is superior to another by nature. Most societies have been built on the bedrock of that idea. It has been the basis for racism, sexism, nationalism, imperialism, and speciesism.[22]

LaShonda's Story: The Victim's Narrative

LaShonda Davis was an intelligent, eager-to-learn, and enthusiastic Hubbard Elementary School student.[23] She was a star student, earned high grades, and was considered a leader among her peers.[24] However, in the fall of 1992, Hubbard Elementary School, located in

22. *See* EMILIE BUCHWALD, RAISING GIRLS FOR THE 21ST CENTURY IN TRANSFORMING A RAPE CULTURE 179, 183 (Emilie Buchwald et al. eds., 1993).

23. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 634-35 (1999) (noting LaShonda's previously high grades before the sexual harassment began).

24. *Id.* at 635.

Monroe County, Georgia, became a place of considerable distress and anxiety for her.[25]

Although only in fifth grade, LaShonda was unable to sleep, showed signs of depression, and lost the ability to concentrate.[26] She became weepy and frustrated, and she was unable to approach Hubbard Elementary School, particularly her fifth grade class. The little girl who had once seemed confident, communicative, and cheerful suddenly feared going to school. Her apprehensiveness and tension were noticed at home and school;[27] LaShonda's performance in school declined, her previously high grades fell, and in the spring of 1993, her father discovered a suicide note.[28] Barely eleven years old, Miss Davis, an African-American little girl, had lost the desire to live and go to school.[29]

According to the Court in *Davis v. Monroe County Board of Education*, beginning in the late fall of 1992 and continuing through the spring of 1993, LaShonda was the victim of a classmate's (G.F.) severe and persistent misconduct, including objectively vulgar comments, groping, and touching.[30] Writing for the majority, Justice Sandra Day O'Connor noted that the harassment began with G.F.'s attempts to touch LaShonda's genital area and breasts.[31] Vulgar comments and lewd suggestions, such as "I want to get in bed with you" and "I want to feel your boobs," accompanied his unwelcome physical advances and culminated into more direct and open displays of sexual harassment, often in the classroom.[32]

Over a five month period, G.F. continued to harass LaShonda in a similar fashion, but the harassment escalated to include rubbing against her body in the hallway and more overt in-class misconduct.[33] Each incident, according to the petitioner's complaint, was promptly reported to LaShonda's classroom teachers, including Whit Maples,

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25. *Id.* *See also* Reply Brief for the Petitioner at 11, Davis v. Monroe, 526 U.S. 629 (1999) (No. 97-843) [hereinafter Petitioner's Brief] (noting how sexual harassment interferes "with a student's academic performance and emotional and physical well-being").

26. *See e.g.*, *Davis*, 526 U.S. at 635.

27. *Id.* at 634-35.

28. *Id.* at 634 (referring to communications between LaShonda and her parents, where she told them she "didn't know how much longer she could keep [him] off her").

29. *Id.*

30. *Id.* at 632-33. According to the Davis complaint, LaShonda was not the only victim of persistent sexual harassment by G.F. The complaint alleged that his misconduct extended to other fifth grade girls, who also complained to the teachers and attempted to share their discontent with Bill Querry, the Hubbard Elementary School principal. *Id.* at 635.

31. *Davis*, 526 U.S. at 633 (citing Petitioner's Complaint).

32. *Id.* (quoting Petitioner's Complaint, at 7).

33. *Id.* at 634.

Diane Fort, and Joyce Pippin, and efforts were made to meet with the principal.[34] However, when LaShonda attempted to meet with Hubbard Elementary School principal Bill Querry, she was told by a teacher that "if [Querry] wants you, he'll call you."[35]

After an incident wherein G.F. placed a doorstop in his pants and approached LaShonda in a sexually suggestive manner during a physical education class, she again reported the conduct to her classroom teacher and her mother.[36] Her mother followed up, as she had with each of the previous incidents that LaShonda informed her about, by calling the teacher in whose class the harassment occurred.[37] According to LaShonda, these incidents all occurred at Hubbard Elementary School during school hours, often in class or immediately after, and under the gaze of teachers and school administrators. When LaShonda's mother confronted Principal Querry five months after the initial incident of sexual harassment to ask when disciplinary action would take place, she was informed that maybe he would "have to threaten [G.F.] a little bit harder."[38]

Even moving LaShonda to another classroom seemed to have been too much to ask of the Hubbard Elementary School faculty and administration, as efforts were not made to move either G.F. or LaShonda.[39] "On the contrary," wrote Justice O'Connor, "notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G.F."[40]

The harassment came to an abrupt end shortly after Mrs. Davis' final attempt to resolve the question of G.F.'s discipline with Principal Querry. G.F. never denied that his behavior was extremely inappropriate or demeaning. The problem, as it appears, was that he was never disciplined. It was at this time that G.F. "was charged with, and pleaded guilty to, sexual battery for his misconduct."[41]

Sadly, at the conclusion of her fifth grade year, LaShonda was not the only victim of the school's failure to address sexual violence in its school; other victims included G.F. and the other girls whom he had harassed. LaShonda and the other young women were the obvious

34. *Id.*
35. *Id.* at 635 (quoting Petitioner's Complaint, at 10).
36. *Id.* at 634.
37. *Davis*, 526 U.S. at 634.
38. *Id.* at 635. According to the Petitioner's complaint, Querry asked why LaShonda "was the only one complaining." *Id.* (quoting Petitioner's Complaint, at 12).
39. *Id.*
40. *Id.*
41. *Id.*

victims.[42] LaShonda's grades, self-esteem, and confidence (not only in herself but also her teachers) were horribly compromised during her five-month battle. However, the school district's failure to act, educate, and promote an equitable learning environment also ultimately hurt G.F. Perhaps, had he been disciplined and clearly told what the district would not tolerate, he could have conformed his behavior to appropriate school conduct. The Monroe County Board of Education's deliberate indifference to his known acts of harassment left G.F. without guidance and ultimately resulted in an introduction to the criminal justice system, caused students to lose confidence in the school system, and severely compromised LaShonda's ability to receive an education.

In a Title IX claim later filed in the United States District Court for the Middle District of Georgia, LaShonda and her mother claimed that her depression and anxiety were the direct result of severe and persistent peer sexual harassment.[43] According to the Davis family, despite "a string" of reports from the victim and her mother, school administrators and the principal failed to take corrective actions to stop the harassment and, therefore, failed to act responsibly.[44] Their complaints to teachers and ultimately the principal seemed to fall on deaf ears.[45]

On May 4, 1994, LaShonda's mother filed suit in the United States District Court for the Middle District of Georgia against the Board, the school district's superintendent, and the school's principal, alleging several things. First, the complaint alleged that the Board was a recipient of federal funds and, thus, subject to the requirements of Title IX. Second, it alleged "that the persistent sexual advances and harassment by [G.F.] upon [LaShonda] interfered with her ability to attend school and perform her studies and activities."[46] Third, the complaint alleged that the deliberate indifference by the Monroe County School Board created an environment that was hostile, intimidating, abusive, and offensive in violation of Title IX, which protects one's right to equal access at educational institutions receiving federal funds.[47]

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42. *Davis*, 526 U.S. at 635 (noting that LaShonda was accompanied by other girls who had been harassed by G.F. when she called upon the Mr. Querry to file a complaint).

43. *Id.*

44. In the spring of 1994, Aurelia Davis, LaShonda's mother, filed suit against the Board, Charles Dumas, the school district's superintendent, and Principal Querry. *Id.* at 635-36.

45. *Id.* at 634.

46. *Id.* at 636.

47. *Id.*

III. JUDICIAL INTERVENTION, DISTRICT RESPONSE, & UNEXPECTED OUTCOMES

One must meaningfully study *Davis* in context with America's cultural climate[48] and, more specifically, that of our schools[49] to truly understand its significance for cases yet to come. Are we willing as a culture to explore the meanings of sex and sexual harassment and treat them as concepts necessary for our children to understand? When are children to be approached about these topics, and what kinds of discussion have we deemed appropriate? *Davis* is a complex case that raises questions about appropriate standards of review, the ideal plaintiff, school boards as defendants, and the unsophisticated harasser.

Should there be a reasonable child standard? What consideration should be given to the plaintiff child who is more sensitive or less confident; does the defendant harasser take the victim as he sees her? What if the harassment were of the nature that most other students would not find offensive? What type of evidence does a plaintiff need to show to have a successful cause of action? Should zero tolerance be the appropriate response by school districts? These questions address both legal and public policy concerns and warrant public discussion to determine how the Court's holding will affect school districts and students throughout the United States.

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48. Exploring America's cultural climate would necessarily involve examining what significance or value has historically been given to discussing sex and sexual harassment. Historically, sex as well as sexual abuse, and harassment experienced by the vulnerable, whether men or women, was given limited space for discussion in the broader social context. *See e.g.*, EMILIE BUCHWALD ET AL., TRANSFORMING A RAPE CULTURE (1993) (discussing sexual violence and its origins in American culture).

Likewise, the intersection of race and sexual violence was generally ignored or treated as insignificant, as women of color, especially black women and girls, were, at a time, by law reduced to the status of chattel and often compared to field animals. In popular literature, the features of black women and little girls were often exaggerated (bulging eyes, rotund torso, overwhelming lips), operating to make these women seem undesirable and lacking "personhood" and the right to consent or refuse sexual overtures. By making these women and girls undesirable or outcasts in the public sphere (as is the case with most forms of bullying), aggressions against their bodies were automatically defensible. Either she asked for it, deserved it, or should have been happy that she got it. Indeed, black women and girls were often the unacknowledged victims of sexual aggression by white, as well as black, men. *See e.g.*, CATHERINE CLINTON & MICHELE GILLESPIE, THE DEVIL'S LANE: SEX AND RACE IN THE EARLY SOUTH (1997) (critiquing America's race denial with regard to the sexual harassment and abuse of Black girls and women); PAMELA HAAG, CONSENT, SEXUAL RIGHTS AND THE TRANSFORMATION OF AMERICAN LIBERALISM (1999).

49. *See e.g.*, PATRICIA DONOVAN, SEX EDUCATION IN AMERICA'S SCHOOL: PROFESS AND OBSTACLES IN EDUCATION (Fred Schultz ed., 1994).

The Supreme Court's decision in *Davis* has been criticized on and off the bench.[50] Ironically, those most troubled by the *Davis* decision represent different ideological perspectives. The case has attracted criticism from both liberal and conservative women and women's groups. Some commentators argue that the Court stopped short of creating an equitable standard in peer sexual harassment cases by imposing a strict and overly burdensome standard.[51] Lynne Bernabei questions why the dissent in *Davis* decried the majority's opinion when the standard established, as she suggests, is "exceedingly high."[52] She suggests that, contrary to predictions about *Davis* opening the floodgates of frivolous litigation, the decision will have a chilling effect.[53]

Others suggest that the Court erred by placing a burden on schools to address sexual misconduct, thereby not only taking these issues out of parents' hands but also exposing school districts to potential liability that Congress could not have foreseen nor anticipated with Title IX. Judges are also weary of the *Davis* decision.[54] In their dissent, Justices Clarence Thomas, Antonin Scalia, and Anthony Kennedy criticized the majority for applying an overly broad and liberal standard in their interpretation of Title IX. The dissenting Justices suggested, "[O]nly if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power."[55] To read the provisions of Title IX in full, they suggested, is to learn that it does not explicitly create a private cause of action.[56]

Shortly after the *Davis* decision, Judge Colleen McMahon publicly lamented the overwhelmng "flood" of litigation triggered by the Court's decision.[57] In *Manfredi v. Mount Vernon Board of Education*, considered part of the *Davis* progeny, McMahon's discontent with the *Davis* ruling is hardly concealed. While she recognized the harms experienced by the victim in *Davis*, she forewarned that the Court's holding inevitably would be applied to lawsuits with far less "heinous behavior."[58] In her opinion, allowing private causes of action to stand

50. *See* Hamblett, *supra* note 15, at A9 (quoting Judge McMahon).

51. *See* Bernabei, *supra* note 15 (citation omitted).

52. *Id.*

53. *Id.* (asserting that "it is much more likely that Davis will have the opposite effect—reducing the number of federal suits brought by sexually harassed or abused students").

54. *See* Hamblett, *supra* note 15, at A9 (quoting Judge McMahon).

55. *Davis*, 526 U.S. at 655.

56. *Id. But see* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) (creating an implied private cause of action in sex discrimination cases).

57. *See e.g.*, Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp. 2d 447, 447 (2000).

58. *Id.*

against school districts that are deliberately indifferent to allegations of peer sexual harassment spurred a surge of litigation that lower courts were responsible for addressing.[59] According to McMahon, "*Davis* is a classic example of the old law school maxim that 'bad facts make bad law.'"[60]

Accordingly, Judge McMahon granted summary judgment to the Mount Vernon Board of Education in *Manfredi*, where a second grade student alleged peer sexual harassment.[61] Judge McMahon opined that the school system was not held liable under Title IX for the teasing and physical abuse of an elementary school girl by a male classmate, where the sole allegation of "sexual harassment" centered on the boy touching Manfredi's "private spot."[62] As a matter of law, she reasoned, the acts in *Manfredi* did not rise to those witnessed in *Davis*.

In fact, the court asserted that the second grade aggressor's acts were not "sexual harassment at all."[63] Taking great pains to distinguish *Davis*, McMahon suggested that teasing, shoving, kicking, pushing, poking, and mean conduct can be hurtful, but they are hardly sexual harassment.[64] Moreover, she concluded that the Mount Vernon Board of Education presented a more persuasive defense. The school board pleaded that efforts were taken to limit the harasser's contact with the victim by moving her to another classroom where her grades improved and she seemed more successful, demonstrating that they were not deliberately indifferent to the acts of an "unruly boy" or the complaints of a "sensitive girl."[65]

The problem, as some view the holding in *Davis*, is that frivolous law suits will overwhelm the courts, and behavior that is viewed as reasonable childlike conduct could be conflated with more serious acts of unchecked "heinous" sexual aggression.[66] But whose definition of heinous should determine the outcome of peer sexual harassment cases? Moreover, is it not the courts' role to settle disputes and allow the aggrieved to seek justice, recourse, and remedies?

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59. *Id.* (suggesting that "despite the best efforts of the Supreme Court to restrict its reach, *Davis* will inevitably be applied to justify lawsuits over far less heinous behavior—like this one").

60. *Id.*

61. *Id.*

62. *Id.*

63. *Manfredi*, 94 F. Supp. 2d at 447.

64. *Id.*

65. *Id. See also*, Mark Hamblett, *Judge Blasts School Harassment Case*, THE NAT'L L.J., May 1, 2000, at A9. (quoting Judge McMahon's attack on *Davis v. Monroe* and her fear that courts will be overwhelmed with peer sexual harassment cases).

66. *Manfredi*, 94 F. Supp. 2d at 447.

Other issues remain unclear as to future sexual harassment victims. Is LaShonda's case the best example of a Title IX violation? What if her mother had filed the suit prior to G.F. pleading guilty to sexual battery; would the case have been less persuasive to the majority? At what point did G.F.'s behavior become heinous, or were each of his actions heinous and the matter was simply an issue of pervasiveness over time? Finally, at what point did the school administrators' conduct unquestionably meet the deliberate indifference standard?

Ultimately, *Davis* was correctly decided because Title IX makes clear that it is a school district's responsibility to maintain an environment that will provide equal access to students if it is a recipient of federal funds. Title IX requires, in pertinent part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[67] The district abrogated its obligation to abide by the Title IX requirements. The school board itself failed to meet several Title IX requirements, including failing to hire or appoint a Title IX coordinator or officer who would advise on situations such as those at Hubbard Elementary School.[68] As an agent of the school board, the principal failed to carry out his duties responsibly by neglecting to investigate LaShonda's allegations, meet with the parents involved, and discipline the offender. By acting in a callous and disinterested manner, the principal exposed the district to liability. Thus, it was not G.F.'s behavior in isolation that led to the *Davis* decision but rather the school district's lack of action in a known case in which a student was being deprived an educational opportunity by someone within the school's reach.

The *Davis* case finally gave visibility to a serious problem in America's public schools. However, the Court's lack of guidance poses a problem for future cases. The case could have the unintended effect of spurring criminal law suits brought not by the victim or his/her parents against fellow elementary and middle school students but by teachers and administrators as a way of addressing misconduct by particular students. Judge McMahon suggests that the conduct exhibited by G.F. was criminal, but she distinguishes it from the conduct of a boy who touched a seven-year-old girl's "private parts" and in nine

67. 20 U.S.C. §1681(a) (2001).

68. *See Davis*, 526 U.S. at 635 (noting also that the district had failed to instruct its employees about sexual harassment and failed to develop and post a policy about sex discrimination and sexual harassment).

different instances knocked her down on the playground.[69] But how will school administrators decide what is criminal and who are the criminals? Unfortunately, as exhibited in some school districts, fear of being personally named in a peer sexual harassment lawsuit could lead principals to call the police first and ask questions later.

Is criminalizing sexual misconduct among elementary and middle school students the correct response? Arguably, the answer would be no, as it flies in the face of public policy and is inherently misguided to subject broad groups of children, many of whom may be unwise about the significant harms associated with their behaviors, to the criminal justice system. Schools have mechanisms at their disposal for addressing student misconduct, including one-on-one communication, calling parents, counseling, and disciplinary alternatives, such as detentions, in-school suspensions, out-of-school suspensions, and expulsion. My concern here is that sexual harassment is pervasive at the elementary and middle school levels. Criminalizing the conduct will not stop the behavior. Moreover, inconsistencies based on race, socioeconomic status, family status, and even local geography are inevitable.

In addition, a rush to court addresses neither the victim's trauma nor the cultural climate in schools wherein sexual misconduct frequently occurs. Peer sexual harassment is a pervasive problem in America's schools; however, it is not well documented. While G.F.'s behavior may seem shocking to some, it is not outside of what has become the normative cultural environment of elementary and middle schools. While teachers, principals, and other school administrators realize this, rarely are parents brought to understand the nature and extent of their children's sexual conduct in schools. Unfortunately, most parents find out too late.

For this reason, criticism of the *Davis* approach for failing to address the devastating impact of sexual harassment on the bullied victim, as well as the potential for inequitable knee-jerk responses to its holding, should not be ignored. The *Davis* Court did not address the trauma associated with frequently reporting and possibly documenting obvious, pervasive acts of sexual misconduct that the Court would seem to require. Furthermore, it appears that unless a student zealously advocates on her own behalf like a tenacious lawyer, providing notice after each incident, the knowledge prong of the *Davis* analysis will not be fulfilled. Indeed, it appears that even if a school district was put on notice, its minimal actions to acknowledge the problematic behavior would seem to overcome the deliberate indifference stan-

69. *Manfredi*, 94 F. Supp. 2d at 447.

dard (i.e., if a desk were moved or an interview in the principal's office were held).

A practical approach should be embraced to address peer sexual harassment. Such an approach would include mandatory professional development training for teachers, age-appropriate sexual harassment workshops for students, and greater involvement and accountability among Title IX officers in school districts.

IV. Understanding Sexual Harassment

Sexual harassment became popularly known in the social and political context as arising in the workplace. Early sexual harassment lawsuits were and continue to be brought under Title VII of the Civil Rights Act of 1964, which prohibits abuse of power characterized by manipulation, unwanted sexual attention, coercion, threats of punishment for failure to acquiesce to sexual favors, and the creation of a hostile environment. The courts have recognized two forms of sexual harassment: quid pro quo and hostile environment.

A. Quid Pro Quo

Quid pro quo sexual harassment is that which literally translates to "this for that." It usually occurs when a teacher, supervisor, or professor makes an academic or professional decision based on the victim's willingness to comply with requests for sexual favors. It also occurs when sexual abuse is a term or condition of being a student or employee. It can be used either as a threat of punishment for failure to comply or as a reward for fulfilling the harasser's desire.

B. Hostile Environment

On the other hand, the hostile environment prong of Title VII addresses the existence of patterns of behaviors that are sexual in nature and create an impediment to performance. Sexual in nature includes not only sexual advances but also demeaning comments, jokes, touching, notes, e-mails, and gestures. It is possible, in fact likely, that a hostile environment is created when one is subject to quid pro quo sexual harassment.

C. Sex, Culture, & Harm

The deleterious effect of sexual harassment to a young and eager learner has been compared to that of racism, which was addressed by

the Supreme Court in *Brown v. Board of Education*.[70] The damage that can be caused by racial slurs and epithets in the American lexicon, along with threats of bodily harm, would seem clear to most as creating an impediment in the learning process. Active racial misconduct targeted at another student and ignored by the administration certainly compromises the harassed individual's educational opportunities. This has been widely recognized within the American political, legislative, and judicial process and seems commonly understood within our sociocultural context. Although ever present in American culture, acts of racism are generally understood, for the most part, to be taboo.

However, sexual harassment does not carry the same presence or meaning within our social understanding. While racism is understood to be an irrational, hatred-based reaction to one's genetic or biological markers (i.e., skin color or ethnicity), sexual harassment often is interpreted as something having less to do with one's genetic status (i.e., male or female) than one's behavior.[71] Race, on the other hand, is something we can perceive as "out of one's control." It is immutable, unchangeable, and fixed. For example, one is not black because he or she engaged in questionable or immoral acts.

However, sexually harassing taunts generally attempt to degrade the victim in two distinct ways. The first way that behavior association manifests itself is by associating the victim with a particularly demeaning image that is also associated with certain behaviors. For example, calling the student victim a "prostitute," "trick," "slut," "ho," or "whore" calls to mind images that carry powerful social connotations. Indeed, these are images that most young women would least like to be associated with, as they suggest that (1) sex can be bought from the victim, (2) she engages in morally questionable sexual behaviors, and (3) she has questionable "values."

The second way in which verbal sexual harassment can manifest itself is through taunts that characterize the victim as engaging in sexually deviant behaviors. For example, bathroom graffiti that portrays the victim as "available" or "easy" and suggests that she "can do two at a time" or "sucks all night long" demonstrates this concept quite clearly. Furthermore, it underscores how sexual harassment can be an attack on one's sense of values, moral integrity, and conduct, causing one to wonder how she may have contributed to the sexual harassment.

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70. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

71. *See e.g.*, Gorney, *supra* note 3, at 43 (quoting a victim of peer sexual harassment as wondering "What's wrong with me?").

Cynthia Gorney writes about the experiences of Katy Lyle, upon whom an ABC movie for television was based. The harassment involved graffiti, which remained in the boys bathroom of her Duluth high school for sixteen months, that characterized Katy as a "slut" and contained "pornographic references to dogs, to farm animals, [and] to Katy engaging in sexual relations with her brother."[72] Katy was devastated as classmates began to whisper about her and tease her in the halls.[73]

Katy and her parents confronted the high school principal who failed to take action to remove the slurs from the bathroom walls. His response was that "boys will be boys."[74] Katy was devastated by the graffiti, remembering that "it took my breath away . . . I just burst into tears."[75] However, most devastating for Katy, as she recalled in an interview, was the high school administration's failure to take her case seriously. According to Katy, their failure to act eventually made her question whether she had somehow contributed to maltreatment by her peers. Perhaps for this reason, victims of sexual abuse, whether committed by peers, family members, or strangers, are reluctant to confront their harassers, report cases of harassment, file criminal charges, or seek civil damages.[76]

In the school context, these forms of labeling can have a more pernicious effect than even workplace sexual harassment. In situations involving workplace sexual harassment, one can ask for a transfer within the company, leave the place of employment, or pursue an internal grievance procedure if available. However, students are trapped; they must go to school, and transferring (even if to another class) can be virtually impossible.

Sadly, a common response to sexual harassment is to peer into the victim's life and question what she or he did to warrant such treatment or simply dismiss the misconduct as insignificant, meaningless, or all in the spirit of fun. Our cultural position on sexual harassment has contributed to the pervasiveness of sexual harassment in the workplace and in schools. While a growing body of case law has established that sexual harassment can be costly in the workplace, only recently have elementary, middle, and high school cases of sexual harassment wound their way through the judicial system.

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72. *See* Gorney, *supra* note 3, at 43.
73. *Id.*
74. *Id.*
75. *Id.* (quoting Katy Lyle).
76. *See e.g.*, BUCHWALD, *supra* note 22; *see also*, HAAG, *supra* note 48.

Recent studies conducted among parents and school officials in southern school districts have revealed that most parents and school board members seem to be unaware of the extent to which sexual misconduct occurs in schools and its severity.[77] More than likely, this is not a southern phenomenon, and parents throughout the United States may be unaware of the breadth of issues confronting their children in America's public schools.[78]

From 1996-2000, my research group conducted studies on sexual harassment in middle schools located in southern school districts. These studies included interviewing parents, students, teachers, principals, and school board officials, as well as conducting focus groups, workshops, and professional development training sessions for teachers. The empirical data collection involved conducting over two hundred workshops with middle school students to learn about their perceptions relating to sexual harassment. Data gathering also included meeting with parents who are often overlooked in studies of this nature, most notably African-American parents in inner-city communities.[79]

Our research revealed that school board members were often unaware of the extent to which sexual harassment was prevalent in their districts. While they knew offensive behaviors were a part of the cultural climate of schools, they often were naïve about the pervasive nature of the problem. Also, our research revealed that the behaviors crossed racial, socioeconomic, and gender social constructions. Thus, from the inner-city schools to those in more elite subdivided areas, sexual harassment was pronounced and intense. Parents were not necessarily unaware of the problem, particularly if their children were the targets of harassment.

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77. The original impetus for the study involved studying the high incidence of students of color being over-identified into special education programs. Data at the time indicated a link between special education and entrance into the criminal justice system. This often involved students being charged by their teachers with crimes such as "terroristic threatening" for making inappropriate comments, including calling their teachers "bitch," "whore," or "cunt." Over the course of four years, over two hundred workshops were conducted with middle school students to determine, among other things, their understanding of sexual harassment and the frequency of it at their particular schools.

78. *See e.g.*, Gorney, *supra* note 3 (discussing how the mother of a Minnesota school girl "burst into tears" when she learned about the sexual harassment that her daughter had been encountering for nearly two years). Parents seem most concerned and disappointed, however, by school administrators' lack of action to remedy the misconduct.

79. These interviews and focus groups in inner-city communities were done with the assistance of local boards of health and community leaders. Often conducted in low-income housing communities, these workshops were informative and well received by the parents.

Clearly, parents are aware that schooling one's child is not what it used to be; however, the challenge seems to be in recognizing that children as young as seven or eight years old are engaging in behaviors that would be unacceptable in America's workplaces. School board members and parents may be reluctant to acknowledge that America's schools are social microcosms even at the elementary school level. This oversight perhaps could be related to parents' unwillingness to see how behaviors witnessed in the home or viewed on television are carried into the classroom. Acknowledging that sexual harassment in the public school setting also means a loss of the myth of innocence. As one school board member told me in response to my suggestion that middle school students should receive sexual harassment training, "But they are only babies!"

V. FRAMING APPROPRIATE RESPONSES

Sexual harassment has not been taken seriously as a cultural phenomenon, particularly in the context of schools and among students. Bullying, interpreted more often as one more aggressive or larger young male dominating the weaker male, has received much more attention in the popular media and in scholarship than peer sexual harassment in the public school setting.

Davis does not necessarily teach us what the appropriate legal response to peer sexual harassment might be. In an effort to achieve balance, the United States Supreme Court casts the case in limbo, creating a remedy for LaShonda Davis that places all school districts that receive federal funding on alert that unchecked peer sexual harassment could result in a successful private damages action against the district and its employees.[80] However, the threshold requirements, which happen to be stricter than those imposed in cases of teacher-student sexual harassment, could be perceived as almost insurmountable.[81] What is to be done?

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80. *See* Williams, *supra* note 15 (noting that "Davis makes clear that institutions can be required to pay damages under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally supported education . . .".). *See also*, KF's Father v. Marriott, 2001 U.S. Dist. LEXIS 2534 (S.D. Ala. Feb. 23, 2001) (finding that the plaintiff suffered severe, pervasive, and objectively offensive sexual harassment but failed to demonstrate that defendants were deliberately indifferent); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (suggesting that a flood of frivolous lawsuits will result from the *Davis* case).

81. *See* Bernabei, *supra* note 15 (citation omitted) (suggesting that the Supreme Court "created a new and onerous standard of liability"). *See also*, Manfredi v. Mount Vernon Bd. of Educ., 94 F. Supp. 2d 447 (2000) (granting summary judgment to the Mount Vernon Board of Education and its officials).

Ultimately, the answers to peer sexual harassment are not found in the courts. While relief may be found for the immediate victim (often years after the incidents occur), others are left to deal with an unfortunate cultural climate that perpetuates itself. This is particularly true for elementary and middle schools, where classes on sexual responsibility often are not taught or are taught by teachers who admit their limited knowledge and skill in effectively teaching students what they need to know.

First, sexual harassment must be acknowledged as a pervasive and persistent problem in America's public schools. Second, once accepted as a problem, stakeholders who will help to articulate a solution must be identified. Often, key people who could address problems such as sexual harassment are left out of the process, including school guidance counselors, parents, and the students themselves. Third, teachers must have professional development training that will inform them about Title IX, Title VI, and Title VII. They also must be aware of their potential liability as an agent of the school for failing to address pervasive, persistent, and concrete forms of sexual harassment and violence in their classrooms and hallways. Fourth, students must be trained. Our workshops and focus groups with boys and girls proved to be extremely helpful, and students responded positively. Finally, school boards must make clear in their literature to parents, at town hall meetings, and at school board meetings that sexual harassment is prevalent in schools. They also must inform parents that the behavior will be disciplined and their cooperation is expected.